United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

76-7042

To be argued by
SEYMOUR D. LEWIS

United States Court of Appeals

For the Second Circuit

B P/S

TAXI WEEKLY, INC.,

Plaintiff-Appellee,

against

METROPOLITAN TAXICAB BOARD OF TRADE, INC., HOSYND PUBLICATIONS, INC., JACK PLOTSKY, ESTATE OF MORRIS HEIT, ESTATE OF GEORGE MCINTYRE, ALFRED ZEFF, MORRIS LEFKOWITZ, MILTON MARKS, LEON MURSTEIN, GERALD NAREN, IRA SUCHMAN and LEONARD SCHAFFRAN,

Defendants-Appellants,

and

TAXICAB BUREAU, INC., EMPIRE TAXICAB COOPERATIVE, INC., INDEPENDENT TAXICAB OWNERS GUILD, INC., UNITED TAXI OWNERS GUILD, INC., BENJAMIN BOTWINICK, SALVATORE BARON, ESTATE OF ALFRED J. MARKS and ESTATE OF NATHAN LEVINE,

Defendants.

BRIEF OF DEFENDANTS-APPELLANTS

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Preliminary Statement

This is an appeal by the Metropolitan Taxicab Board of Trade (MTBOT), Hosynd Publications, Inc., Jack Plotsky, Estate of Morris Heit, Estate of George McIntyre, Alfred Zeff, Morris Lefkowitz, Milton Marks, Leon Murstein, Gerald Naren, Ira Suchman and Leonard Schaffran from a judgment of the United States District Court for the Southern District of New York (Griesa, J.) entered February 9, 1976 awarding plaintiff $875,000 as treble damages and attorneys' fees for violation of Section 1 of the Sherman Act. The jury returned a verdict of $225,000 in favor of plaintiff Taxi Weekly, Inc. against defendants-appellants and Benjamin Botwinick*; the Court awarded $200,000 as

* Defendant Benjamin Botwinick is represented by separate counsel on this appeal, and references to "defendants" or "appellants" in this brief, unless otherwise stated, do not include Botwinick.

attorneys' fees. Notice of appeal of all defendants-appellants was filed on January 29, 1976.

Nature of the Case

This is an antitrust action brought under Section 1 of the Sherman Act by Taxi Weekly, Inc., a defunct corporation that, among other things, published a weekly newspaper called *Taxi Weekly*, which was directed primarily to the taxicab industry in New York City. Appellant MTBOT is an association of New York City taxicab fleet owners. The individual appellants are members of MTBOT and are New York City taxicab fleet owners.

Reduced to its basics, Taxi Weekly, Inc. charged that appellants "put pressure on the industry newspaper, *Taxi Weekly*, to adhere to their views, and they were unable to succeed in that endeavor, so they agreed with each other to cancel their subscriptions, to boycott that newspaper in an effort to force it out of business so it could be silenced in the industry" (A49, 10).* Taxi Weekly, Inc. also claimed that appellants induced *Taxi Weekly* advertisers to cease advertising (A49-50). Taxi Weekly, Inc. sought damages for the destruction of its business, based on a "going-concern" value of $248,230. The jury found for Taxi Weekly, Inc. and awarded damages of $225,000.

Statement of Issues

(1) Whether the District Court lacked subject matter jurisdiction;

(2) Whether the acts charged amount to a violation of the Sherman Act;

(3) Whether the amount of damages awarded was improperly determined, and excessive; and

(4) Whether the amount of attorneys' fees awarded was excessive.

* References to "A" are to pages of the Joint Appendix.

Statement of Facts

(a) Liability

Taxi Weekly, Inc. was incorporated in 1945 by its then sole owner, editor and publisher, Abraham Weisinger (A44, 885-6). It published two newspapers, *Taxi Weekly* and *Taxi Age,* and one magazine, *Taxi Industry Auto Rental News. Taxi Weekly,* which was the subject of this action, was first published in 1945 (A885). *Taxi Age,* which commenced publication in 1932 (*Id.*), was identical in editorial content to *Taxi Weekly,* but carried a different masthead (A811-12). *Taxi Weekly* was distributed by second-class mail; *Taxi Age* by third-class mail or in bulk (A829). This arrangement was maintained so that Taxi Weekly, Inc. could obtain preferential mailing rates for *Taxi Weekly* (A835). The owner and publisher of Taxi Weekly, Inc. at the time of the trial, Lester Peterman, testified that Taxi Weekly, Inc. secured this preferential rate by filing false affidavits with the United States Postal Service (A868). In 1963 the average weekly paid circulation of *Taxi Weekly* was approximately 6,000; the average weekly circulation of *Taxi Age* was approximately 5,000 (A739-42).

In 1966, *Taxi Weekly, Taxi Age* and the magazine ceased publication, and Taxi Weekly, Inc. effectively went out of business (A201).

Taxi Weekly was directed primarily to the taxicab industry in New York City (A44-5). More than two-thirds of its weekly circulation went to New York City taxicab fleet owners who paid for their subscriptions and then distributed copies to their drivers (A45-6).

Appellant MTBOT is a trade organization composed of most of the major New York City taxicab fleet owners. MTBOT was formed to promote the interests of the fleet owners in New York and, until 1964, *Taxi Weekly* reflected its views and, therefore, the views of the fleet owners.

In 1958, Weisinger, who had been sole owner of Taxi Weekly, Inc. sold a half interest to Peterman for $15,000 (A94-6). By 1963, however, Weisinger was assuming a less active role in the management and editorial policy of Taxi Weekly; Peterman had assumed control (A93-4).

In early 1964, under Peterman's direction, the editorial policy and content of *Taxi Weekly* changed (A253). *Taxi Weekly*, which in effect had been an organ representing the views of the fleet owners (A107), started taking positions not in accord with the views of the fleet owners on three issues of critical importance: (1) the amount and distribution between driver and owner of a pending fare increase (A107-10), (2) the unionization of taxicab drivers (A 230) and (3) whether custom built taxicabs should replace the smaller, less expensive taxicabs favored by the fleet owners (A107-9). The result was alienation of the fleet owners (A960).

Moreover, by early 1964, a dispute had developed between Weisinger, who had for 30 years enjoyed and still enjoyed, the good will of the industry, and Peterman. As Weisinger put it:

> "* * * we just couldn't see eye to eye. His policies were entirely different from mine and these opinions changed, and I had been in the business for nearly 40 years as a taxicab industry before publishing and I knew exactly what the taxicab industry needed without even having to consult any of the people there. That's the reason we got our advertising in most cases. That's the reason I was in the business that long" (A895).

The trial court termed the evidence of Peterman's alienation of both his principal clientele and his partner as "conclusive" (A960-1).

In early 1964, Weisinger instituted proceedings to dissolve the corporation and Weisinger offered to purchase Peterman's interest for $30,000 (A118-19). In 1966, Peterman purchased Weisinger's interest for $50,000 (A128).

Even before this sale occurred, and before the so-called "conspiracy" began, *Taxi Weekly* was in decline. As Weisinger put it:

> "A 'We were losing business.'
>
> Q 'You were losing subscriptions?'
>
> A 'I'd say sure, of course, subscriptions and business as far as that goes, and the other publication too,

> in other words, the magazine. Now, I could sense and know there wasn't any business coming in. We were losing business in the taxi industry and it had nothing to do with the fleet operators of New York City because that [the magazine] went out of the City of New York' " (A900-1).

Weisinger further testified that under Peterman's management:

> "I could see the handwriting on the wall. We weren't spending any money for public relations. We weren't making any attempt to go out and get any advertising. Both for the magazine and the local paper. Our telephone bill was only $65, $70 a month. He [Peterman] came in at one o'clock in the afternoon most every day" (*Id.*).

As *Taxi Weekly* became more "independent" from the fleet owners in its editorial policy and content, the fleet owners reacted by cancelling their subscriptions. Between July 1964 and January 1965 approximately 65 fleet owners, representing approximately 85% of the total fleets subscribing, cancelled their subscriptions to *Taxi Weekly* (A-824-5). As circulation declined, advertising revenue declined with it.

It is undisputed that a number of the cancellations during the six-month period were made on the same date (A-1466). This was the only "evidence" of any industry-wide "conspiracy" to put *Taxi Weekly* out of business. There was no evidence of any coercion on the part of MTBOT or any of the individual appellants to induce fleet owners to cancel, or, indeed, of any joint conduct directed to driving Taxi Weekly, Inc. out of business. There was no evidence even that MTBOT had adopted a policy, formally or informally, that the members should cancel their subscriptions (A160). Although appellee set out to prove that there had been a "conspiracy" and that "coercion" had been used, there simply are no facts in the record to support this conclusion.

On the contrary, the record showed that individual appellants had valid reasons for cancelling their subscriptions. For example, appellant Milton Marks told Peterman:

> "I think there was a feeling that you [Peterman] were antagonistic in one way or another to the fleet operators and that you favored the individuals * * * before the union even started * * * [T]hey felt there was something there whereby maybe you were favoring labor against industry * * * they felt you were leaning maybe in your editorials, in your columns" (A180-1).

Peterman admitted that when he became sole owner of *Taxi Weekly* he changed the policy, calling it "The Completely Independent Taxi Newspaper," and no longer took the views or advice of Weisinger into account (A253, 267). However, Peterman further admitted that as early as Spring, 1964, before the alleged conspiracy even began, and before Weisinger's interest was bought by Peterman, he was warned by Weisinger that if *Taxi Weekly* did not "toe the line and do what the fleet owners wanted," MTBOT would start a rival newspaper (A255).

That is exactly what happened. In September, 1964, a disgruntled former employee of *Taxi Weekly*, who disagreed editorially with Peterman, started a rival publication, the *New York Hackman*, owned by Hosynd Publications, Inc., a partnership in which the public relations man for MTBOT, George McIntyre, held a majority interest (A701-2). Many of the members of MTBOT switched their subscriptions to it (A148-9). As Peterman put it, the *New York Hackman* "was primarily designed to fight the union" (A150)—a position consonant with that of the fleet owners. The *New York Hackman* ceased publication in May, 1966 (A151), when the union drive ended (A152-3). Indeed, the complaint charged that the alleged conspiracy began, "because plaintiff refused to submit to pressure from them [the fleet owners] to change its editorial policy, especially during the drive to organize fleet taxicab drivers into a labor union" (A10).

Finally, Taxi Weekly, Inc. claimed that appellants in some manner pressured other fleet owners to cancel sub-

scriptions and pressured advertisers to cancel their advertising (A49-50). The record completely belies these contentions.

Of the three "advertiser" witnesses that testified at trial, two of them, Frank W. Sailler, formerly of Chrysler Leasing Corporation, and Glenn Moore, of Rockwell International, each testified at trial: (1) that each had nothing to do with advertising by the companies for which they worked (A357, 380), and (2) that no pressure or coercion of any type was placed by appellants on them to cancel advertising in *Taxi Weekly* (A356, 381). This was confirmed on deposition by Moore's superior, Ralph Ulrich (A904-6). The third live witness, Donald Saslow, formerly of a local taxicab dealer, testified that he had no knowledge of advertising in *Taxi Weekly* (A397).

This was confirmed by deposition testimony Taxi Weekly, Inc. introduced at trial. For example, appellant Morris Heit testified that he never discussed, with any representative thereof, whether Chrysler, Dodge or their local dealer should advertise in *Taxi Weekly* (A446-8). Appellant Milton Marks testified that he cancelled his subscription because he did not feel *Taxi Weekly* adequately presented the fleet owner view of the fare increase and that he never had any discussion with his taxicab supplier with respect to its advertising in *Taxi Weekly* (A456). Appellant Leon Murstein denied ever telling any advertiser to stop advertising in *Taxi Weekly* (A466). Appellant Jack Plotsky testified that he cancelled because *Taxi Weekly* took a position on certain matters—the fare increase and unionization—that "hurt our business" (A468), and that he "wasn't going to buy anything that was going to hurt me, whether a newspaper or a product" (A469). He, too, denied advising any advertisers to cancel, or discussing such cancellations with other fleet owners (A483) (*see also, e.g.,* A492, 504-5, 512-13).

In summary, the case put in by Taxi Weekly, Inc. was entirely circumstantial, supported by not a single piece of direct evidence—from appellants, from *Taxi Weekly's* advertiser witnesses, from Peterman or from any other source.

(b) Interstate Commerce

In mid-trial, over appellants' objection, the trial court ruled that as a matter of law there was a sufficient effect on interstate commerce to sustain jurisdiction (A756-8). This ruling was based on what "the proof was or offers of proof" (A1167). It seemed to the Court that the advertising of *Taxi Weekly* was "to some extent placed interstate, sold interstate and related to products clearly sold interstate, namely, potential automobiles which were sold coming from Detroit to New York" (A1181). The Court intended to allow appellee to "complete" the record on this issue out of the presence of the jury after the trial was concluded (A1167-8).

After the close of the case, after the jury had been discharged, Taxi Weekly, Inc. twice attempted to "complete" the record on this issue through further testimony of Peterman (A1168, 1334). Ultimately, at the Court's insistence, without waiving any rights, the parties entered into a stipulation of certain facts concerning the advertising of Taxi Weekly, Inc. (A1615). The Court then announced that it was basing its prior mid-trial ruling on that stipulation, and on certain "uncontradicted" facts about the value of taxicabs sold in New York City in 1964 (A1425). In the Court's view, under *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951), jurisdiction was established (A1196-7, 1401-4).

The Court made it quite plain that this ruling rested on one very narrow ground:

> "Although there might be dispute of fact as to how many subscriptions of Taxi Weekly went out of State or who paid for those subscriptions, or whether a certain number were Taxi Weekly versus the other publications, Taxi Age, *those issues of fact and any comparable issues of fact were of no real significance because it was apparent that there was no contest as to the fact that Taxi Weekly itself carried advertisements of products, including taxicabs and taxicab equipment, which products were produced out of State, and were shipped into New York and sold in New York as part*

> *of interstate commerce.* And that these advertisements were of products which constituted a substantial volume of interstate commerce. That in addition there was advertising sold in interstate commerce, and that in terms of the substantialities, speaking in terms of dollar volume, *the interstate commerce represented by the sales of products advertised was without any question a substantial amount of interstate commerce,* and that the other features of interstate commerce, the selling of the advertisements and other things contributed to the picture, although not as substantial in dollar volume as the sales of the products themselves" (A1403-4) (emphasis added).

The stipulation shows that for the fiscal year 1964, ending March 31, 1964, before the alleged conspiracy began, *Taxi Weekly* and *Taxi Age* together received a maximum of $6,424.71 in advertising placed from locations outside of New York City (A1615-17). The bulk of this advertising was for the sale of taxicabs and taxicab-related accessories. Total advertising revenues for *Taxi Weekly* and *Taxi Age* in fiscal 1964 amounted to $64,069.63. Neither in the stipulation nor anywhere else in the record is there any quantification of the amount of business, if any, generated in interstate commerce from any of the advertising placed in either newspaper, nor is there any showing that as a result of the so-called conspiracy the amount of business of the advertisers declined in any way. Moreover, Taxi Weekly, Inc. was unable to segregate advertising revenue received by *Taxi Weekly* from that received by *Taxi Age*, and the stipulation covers both newspapers.

The only other "facts" which the Court found, and on which it based its ruling, was that in 1964 a new taxicab cost at least $2,000 and that most of the taxicabs sold in New York in 1964 were manufactured out of New York State by Dodge, Ford, Studebaker and Checker (A1424-5). It was stipulated that in calendar 1964 6,296 taxicabs were purchased by the New York City medallion taxicab industry (A1620). There was no evidence as to whether the sales of these taxicabs were made out of state or through local dealers, or whether sales declined or changed at all in the following years.

The Court's ruling was not founded on the occurrence of the purported antitrust violations "in interstate commerce." After the interstate commerce issue had been taken from the jury, appellee's counsel tried to convince the Court that certain acts had occurred "in interstate commerce" (A1200). But, it is clear that the Court did not and could not properly ground its ruling on this theory, based as it was on facts which were sharply contested at trial. At the very least, the "in commerce" question would have to have been submitted to the jury. The Court made it quite clear that in making its ruling it "went out on a limb in order to shorten this case," and that it wanted a "record clear as a matter of law without any possibility of confusion or somebody saying there is an issue of fact which should have gone to the jury" (A1198).

What is clear on the interstate commerce issue is that, in one year, fiscal 1964, Taxi Weekly, Inc. derived less than 10% of its gross newspaper advertising revenues, or approximately $6,000, from locations outside of New York (A1615-17), and that certain advertisers in *Taxi Weekly* and *Taxi Age* derived revenue from interstate sale of their products. It was on these facts and only these facts that the Court based its ruling (A1403-4).

(c) The Damage Award

The jury awarded Taxi Weekly, Inc. $225,000 in damages (A1159). The figure reflects the jury's determination of the "going-concern" value of Taxi Weekly, Inc.,* prior to the commencement of the conspiracy in Spring, 1964. In reaching this figure, the jury apparently relied on the testimony of Taxi Weekly, Inc.'s expert witness, James B. Kobak (A514), who presented appellee's only theory of damages.

Kobak calculated the "average earnings" of Taxi Weekly, Inc. for the fiscal years 1962, 1963 and 1964, and applied a "price-earnings" ratio of ten to those earnings, which resulted in a "going-concern" value for Taxi Weekly,

* Peterman testified that the magazine could not continue publication without *Taxi Weekly* (A201-2).

Inc. of $248,230 (A548, 1491). It was this figure that the jury apparently reduced to $225,000.

The net profit of Taxi Weekly, Inc., stated in its year end financial reports and on its federal and state tax returns for the period in question was:

1962—	$ 304.24	(A1506, 1555)
1963—	169.95	(A1515, 1563, 1594)
1964—	6,169.91	(A1522, 1567, 1595).

The average annual profit of Taxi Weekly, Inc. then is $2,214.70.

Kobak, however, calculated profit differently. He started by subtracting operating costs from gross revenue (A-1490). He then deducted what he termed would have been a "normal" salary for individuals performing the same functions as Peterman and Weisinger, or $15,000 (A546-7, 1490). Peterman and Weisinger had, in fact, received salaries during those years of approximately $25,000 each, or $50,000 total (A1507, 1517, 1523).

Under Kobak's analysis, the reconstructed yearly profit for Taxi Weekly, Inc. was far greater:

1962 —	$42,104	
1963 —	28,970	
1964 —	42,089	(A548, 1490).

Kobak then made deductions for federal and New York State income tax, and arrived at net profit figures in the years in question of:

1962 —	$26,894	
1963 —	20,688	
1964 —	26,887	(*Id.*).

Thus, the average yearly profit, as reconstructed by Kobak, rose from $2,214 to $24,823 (*Id.*).

Kobak then multipled this figure by a "price/earnings ratio" of ten, a multiple which, he stated, represented a discount from the multiple of sixteen that he found applicable to the securities of large, publicly traded companies in the publishing business (A549-50, 1491). This dis-

count was necessary, according to Kobak, because Taxi Weekly, Inc. was a small, private company with static growth patterns (*Id.*). On this basis, Kobak concluded that Taxi Weekly, Inc. had a "going-concern" value of $248,230 (A549, 551, 1491).

Kobak testified that, in making this analysis, he did not take into account:

(a) the effect of the disagreement that had developed between Peterman and Weisinger (A724-5);

(b) the alienation by *Taxi Weekly* of its primary readership, the fleet owners (*Id.*);

(c) the change in viewpoint of *Taxi Weekly* (A253) which was tantamount to starting a new newspaper (A579-81), and

(d) the fact that cash payments for a business are usually lower than the going-concern value (A585-6).

More importantly, Kobak did not take into account the liability to a prospective purchaser of the admitted postal fraud perpetrated by Peterman and Taxi Weekly, Inc. (A635). Peterman testified that, in order to retain second class postal privileges for *Taxi Weekly*, he filed false affidavits with the United States Postal Service that indicated that 90% of *Taxi Weekly's* subscriptions were paid subscriptions (A867-8). In fact, *Taxi Weekly* was distributed both free and under paid subscriptions—those who had paid for their subscriptions received a newspaper with a masthead *Taxi Weekly;* those who received free copies of *Taxi Weekly* received a newspaper entitled *Taxi Age* (A834-5). The editorial content of the two were exactly the same (A813). Failure to note the free distribution of *Taxi Age* in the postal affidavits thus became a direct violation of United States postal regulations requiring that in order to be classified as a "separate" publication for this purpose, a publication must have at least 25% different editorial content (A877-8).

Thus, actual circulation for *Taxi Weekly* was not in excess of 11,000, as Peterman contended (A45, 730-1), but 5,900, as he put in his affidavit (A850, 1609).

Moreover, in fixing the "normal" salary for officers, Kobak disregarded the fact that on both federal and New York State tax returns, Taxi Weekly, Inc. declared salaries for its officers in 1962, 1963 and 1964 of approximately $50,000 (A1507, 1515, 1523, 1594, 1595). Putting aside the tax consequences of those salaries, the fact is that the statements in those returns were declarations made "under penalty of perjury" that the information contained therein is "true, correct, and complete" (A1506). Indeed, neither Peterman nor Kobak offered any explanation as to why the $25,000 salary for Peterman and Weisinger was selected, if in fact those salaries were irrelevant to their real worth.

In short, Kobak's analysis not only disregarded the business realities that affected the "going-concern value" of Taxi Weekly, Inc., but overlooked or ignored two sworn statements by the owner of Taxi Weekly, Inc. that seriously diminished its worth. The result was a "going-concern value" more than 100 times Taxi Weekly, Inc.'s actual average net profits of $2,214.70 for 1962, 1963 and 1964.

Appellants' expert, Joel W. Harnett, taking into account not only the above factors, but also the admitted declining trend in circulation income, decline in profit, and that the taxi industry in New York City itself was not a growth industry, valued Taxi Weekly, Inc. at slightly less than its book value (A946). In view of the other problems, the postal fraud and the alienation of *Taxi Weekly's* readership, Harnett doubted whether any prospective purchaser could be found (A939, 952).

ARGUMENT

I

THE COURT LACKED SUBJECT MATTER JURISDICTION.

A. The Trial Court's Ruling

The threshold issue below was whether the District Court had subject matter jurisdiction over this action by reason of the federal power to regulate interstate commerce. Mid-trial, the Court removed this issue from the

jury's consideration by ruling as a matter of law that, on the basis of appellee's *proposed* evidence, a sufficient connection with interstate commerce to sustain the Court's subject matter jurisdiction was apparent (A756-7). Counsel were instructed to complete the record on this issue after trial (A757).*

The post-trial proceedings included testimony by Peterman and introduction of additional exhibits (A1164, 1334). Ultimately, a stipulation concerning certain advertising revenues received by Taxi Weekly, Inc. (A1615) was inserted in the record (A1417). The Court, citing the stipulation, then reiterated that under the Supreme Court's language in *Lorain Journal Co.* v. *United States,* 342 U.S. 143, 151 (1951), the presence of subject matter jurisdiction was incontestable (A1401-4, 1424-5). It was the trial court's position throughout the proceedings below that since *Taxi Weekly* carried advertising for corporations whose products were sold in interstate commerce, the *Lorain Journal* decision required a ruling that the trial court's jurisdiction had been adequately established, even if the advertisements themselves resulted from intrastate transactions (A1196-7, 1331-2, 1401, 1404). As the Court put it:

> "I believe that if a newspaper advertises automobiles of the Chrysler Corporation and the Ford Corporation and that substantial amounts of the autos of those corporations are brought into the city of that newspaper and sold there, that is enough to establish the necessary effect on interstate commerce * * *" (A1332; *see also,* A1403-4).

* It was appellants' position throughout the trial (A757) and post-trial proceedings (A1316, 1322) that either there was no jurisdiction or that the issue of jurisdiction involved contested questions of fact which should have gone to the jury. The trial court's unorthodox procedure of directing completion of the factual record on this issue *after* the jury's verdict was wholly improper. If additional factual proof was necessary to support the Court's conclusion, then all such evidence should have been presented to the jury. *Marra* v. *Bushee,* 447 F.2d 1282, 1284 (2d Cir. 1971); *Marks Food Corp.* v. *Barbara Ann Baking Co.,* 274 F.2d 934 (9th Cir. 1959). If the Court's ruling was supported by the evidence, then there was no need for post-trial completion of the record on the issue. Even the Court found itself in an "odd procedural posture" (A1205).

This purported "effect" on interstate commerce was the sole foundation for the Court's jurisdictional finding (A1404).

Appellants submit that this conclusion, resting upon a fundamental misapplication of the *Lorain Journal* decision, was clearly erroneous as a matter of law, and must be reversed and the judgment vacated on the ground that the trial court lacked subject matter jurisdiction based on interstate commerce.

B. Appellants' Acts Were Neither "in Commerce" Nor Did They Have a "Substantial Effect" on Interstate Commerce.

It is well settled that in suits under the Sherman Act, subject matter jurisdiction predicated on interstate commerce may be established upon proof that the acts sued upon either "occurred in interstate commerce or because those acts, though occurring wholly on the local level, substantially affected interstate commerce." *Lieberthal* v. *North Country Lanes, Inc.*, 332 F. 2d 269, 270 (2d Cir. 1964). The burden of proving that one of these jurisdictional tests is satisfied rests squarely with plaintiff. *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178 (1936). The record below, barren of jurisdictional facts save the stipulation of certain advertising revenues, demonstrates that under the governing authorities, Taxi Weekly, Inc. utterly failed to meet this burden of proof, and the action therefore should have been dismissed.

1. There was no evidence that the acts complained of "occurred in interstate commerce."

The first of the alternative jurisdictional tests is "qualitative" to the extent that it rests on the focus of the alleged illegal activity, *i.e.*, whether defendants' conduct occurred within the flow of interstate commerce or acted directly upon the interstate trade engaged in by plaintiff. *Hospital Building Co.* v. *Trustees of the Rex Hospital*, 511 F. 2d 678 (4th Cir.), *cert. granted*, 96 S.Ct. 33 (1975); *Las Vegas*

Merchant Plumbers Ass'n. v. *United States*, **210 F. 2d 732** (9th Cir.), *cert. denied*, 348 U.S. 817 (1954).

> "It is settled that the 'in commerce' test is not whether the conduct complained of is aimed at a business engaged in interstate commerce, but whether the conduct complained of acts directly upon the interstate aspects of such a business." *Hospital Building Co., supra*, 511 F. 2d at 682.

The record below contains no evidence whatever that appellants' alleged conspiracy had any direct connection with interstate commerce.*

The essential claim in the case at bar was that pursuant to a conspiracy, conceived and implemented in New York City by New York City taxicab fleet owners, appellants destroyed *Taxi Weekly* by (1) cancelling their subscriptions to *Taxi Weekly* in unison, and (2) exerting pressure upon the sources of *Taxi Weekly's* advertising, including those of a national character, to cancel advertising placed in *Taxi Weekly* (A10, 49-50). The proof adduced as to each of these allegations clearly defeats any suggestion that appellee met or could meet the qualitative "in commerce test."

As to the joint cancellations, the record shows, and it is not disputed, that *Taxi Weekly* served a local constituency—the New York City taxicab industry (A45); that each cancelling subscriber was located in New York (A1466-8); that all meetings or conversations which may have constituted the conspiracy occurred in New York (A160); and that each act of cancellation occurred in New York (A1466-8). The alleged conspiracy to boycott *Taxi Weekly* was entirely and indisputably intrastate, if not intracity, in nature.

If appellants had coerced out-of-state advertisers, concededly their alleged conspiracy would be sufficiently "in

* If there were such evidence, then a disputed issue of fact which should have been resolved by the jury was raised thereby. The Court below explicitly rested its finding of jurisdiction on "uncontested facts", *i.e.*, the stipulation of *Taxi Weekly* advertising revenues (A1425) which, as the Court recognized, was relevant only to an "affecting commerce" theory of jurisdiction (A1404).

commerce'' to sustain federal jurisdiction. But the trial court did not find sufficient evidence of the alleged ''coercion'' upon which to base its ruling on jurisdiction, and its decision rested solely on purported satisfaction of the ''affecting commerce'' test (A1404). Indeed, the record concerning such ''pressure'' demonstrates only that appellee completely failed to prove that this pressure on so-called ''national'' advertisers ever existed.

Appellee's proof in this regard was limited to the testimony of employees of two of *Taxi Weekly's* ''national'' advertisers. Sailler and Moore each testified that neither had anything whatsoever to do with the advertising policies and/or purchases of his respective employer (A357, 380). On both direct and cross-examination, Sailler testified that none of the appellants ever demanded or suggested that Chrysler terminate its *Taxi Weekly* advertising, or indeed, that any of them had even discussed *Taxi Weekly* with him (A342-3, 356-7). Appellee's counsel read deposition testimony of Sailler which reiterated that no pressure had been applied to Chrysler as to its advertising in *Taxi Weekly* (A343, 346).

Moore's testimony was even less probative of appellee's allegations. Despite the proddings of appellee's counsel, Moore simply had no recollection of any discussions with any appellant, any complaints concerning Rockwell advertising, or anything else remotely connected to this litigation (A370-3). Subsequently, appellee introduced deposition testimony of yet another Rockwell employee, Ralph Ulrich, which further affirmed that appellants' displeasure with *Taxi Weekly* played absolutely no part in Rockwell's cancellation of *Taxi Weekly* advertising (A905-6).

In addition to this total lack of affirmative evidence, appellee read portions of the depositions of several of the appellants, every one of which contained an express denial of ever having discussed *Taxi Weekly* advertising with any of its advertisers (A336-8, 456, 466, 469, 492-3, 504-5, 512). In short, there is not the slightest shred of evidence in the record to support the allegations of ''pressure'' applied by appellants on out-of-state advertisers.

This failure of proof thus forecloses jurisdiction predicated on acts occurring "in commerce." Given the lack of evidence of any acts beyond the wholly intrastate conspiracy to cancel subscriptions, the facts herein became identical to those of *Uniform Oil Co.* v. *Phillips Petroleum Co.*, 400 F.2d 267 (9th Cir. 1968) and *Harlem River Consumers Coop., Inc.* v. *Retail, Wholesale & Chain Store Food Employees Union, et al.*, No. 70 Civ. 4128 (S.D.N.Y. February 18, 1976) (Pierce, J.), and the conclusions of those courts that such circumstances failed the "qualitative" test of jurisdiction is required in the case at bar.

In *Uniform Oil*, plaintiff alleged a price-fixing conspiracy among four gasoline retailers in one Montana city. Affirming a directed verdict dismissing the action for lack of jurisdiction the court held:

> "The alleged illegal activities of which Uniform Oil complained occurred only in the city of Helena and were, therefore, intrastate in nature. This being so, Uniform Oil was required to prove that the transactions in question had a 'not insubstantial' *effect* upon interstate commerce." 400 F.2d at 269 (emphasis added).

Similarly, in *Harlem River Coop.* a local conspiracy to boycott a retail grocer was alleged. The court found that, as in the instant case:

> "In fact, the evidence is clear that the actions of these defendants upon which the plaintiff seeks to predicate a finding of liability were all taken within New York City. Therefore, any finding of interstate commerce must be based on a finding that such commerce was *substantially affected by* the defendants' actions." 70 Civ. 4128 (S.D.N.Y. February 18, 1976) at 22 (emphasis added).

Having succeeded in proving only the possibility of an intrastate conspiracy, *Taxi Weekly* is thus in precisely the same position as plaintiffs in *Uniform Oil* and *Harlem River Coop.* Indeed, this conclusion is implicit in the ruling of the trial court, which found its jurisdiction to rest solely on the "effect" on interstate commerce suggested by the

interstate sales of products by those who advertised in *Taxi Weekly* (A1401-4).* Therefore, if, as appellants submit, Taxi Weekly, Inc. also failed to introduce evidence demonstrating as a matter of law that the alleged intrastate conspiracy had a "substantial effect" on interstate commerce, the Court below had no jurisdiction to entertain this lawsuit.

2. *There was no evidence that the acts complained of had a "substantial effect" on interstate commerce.*

The second jurisdictional test is "quantitative" since it requires proof that purely local acts had an impact on interstate commerce which, in a quantitative sense, is "substantial." Again, the record below is wholly inadequate to establish jurisdiction on this basis. At best, the evidence showed that the demise of *Taxi Weekly* had a *de minimis* effect on interstate commerce.

The stipulation of *Taxi Weekly* advertising revenues constitutes the only evidence even arguably relevant to any effect on interstate commerce. That stipulation reveals that *Taxi Weekly* and *Taxi Age* printed a total of $6,424.71** worth of advertising that was placed from outside New York State in fiscal 1964 (A1615-17). This is the full impact on interstate commerce of the failure of Taxi Weekly, Inc. Since there was no proof of any direct restraint imposed on such advertising, this effect on interstate commerce is not merely inconsequential, but is "remote

* Appellee argued, unsuccessfully, that "in commerce" jurisdiction had been established (A1200). The trial court's decision was, however, that jurisdiction could be based only on an "affecting commerce" theory (A1404). Appellee's theory was that since its business included interstate elements, destruction of the business was an act "in commerce" (A1168-76). However, the same contention was expressly rejected as a predicate for jurisdiction in *Hospital Building Co.*, quoted *supra*, 511 F.2d at 682. *See also, United States* v. *Yellow Cab Co.*, 332 U.S. 218, 230-34 (1947); *Lieberthal, supra*, 332 F.2d at 277.

** This is the total amount of advertising which was, according to the stipulation, placed by and billed to agencies outside New York (A1615-17). The figure is arrived at by aggregating the billings listed for out-of-state agencies at A1615-17. There are no other such billings contained in the stipulation.

[and] fortuitous" as well, and hence cannot be the foundation for federal jurisdiction. *Lieberthal, supra,* 332 F. 2d at 272; *Page v. Work,* 290 F. 2d 323, 332 (9th Cir.), *cert. denied,* 368 U.S. 875 (1961).

The trial court determined that a substantial effect on interstate commerce was self-evident in the case at bar because the automobile manufacturers who advertised in *Taxi Weekly* sold millions of dollars worth of cars in interstate commerce (A1181). It expressly relied (A1196-7, 1404) on the following language of *Lorain Journal, supra*:

> "There can be little doubt today that the immediate dissemination of news gathered from throughout the nation or the world by agencies specially organized for that purpose is a part of interstate commerce * * * The same is true of national advertising originating throughout the nation and offering products for sale on a national scale. The local dissemination of such news and advertising requires continuous interstate transmission of materials and payments, *to say nothing of the interstate commerce involved in the sale and delivery of products sold.*" 342 U.S. at 151 (emphasis added).

The trial court's citation of *Lorain Journal* to sustain jurisdiction involved a basic misconstruction of the holding therein, in which the Supreme Court's analysis of whether a Sherman Act violation had been established was mistaken for a ruling on the requisites of federal jurisdiction.

The essence of the trial court's conceptual confusion was illuminated by the Ninth Circuit in *Rasmussen* v. *American Dairy Assoc.*, 472 F. 2d 517, 521-2 (9th Cir. 1972), *cert. denied,* 412 U.S. 950 (1973):

> "[A]n important distinction should be stressed—the distinction between the jurisdictional question, with which we are concerned, and the question of whether, in other respects, a substantive violation of the Sherman Act is alleged.
>
> The two problems are frequently confused, and understandably so * * *

> Whether a defendant's conduct constitutes a substantive Sherman Act violation is entirely a matter of congressional definition: Is the defendant's conduct the type of conduct Congress intended to prohibit? Is that conduct a 'restraint of trade' within the meaning of section 1, or an 'attempt' or 'conspiracy' to 'monopolize * * * trade' within the meaning of section 2? The jurisdictional question, on the other hand, concerns Congress' power to reach the defendant's conduct: '[T]he restraint must "occur in or affect commerce between the states * * * *for constitutional reasons.*" '"

See also, Harlem River Coop., supra, 70 Civ. 4128 (S.D.N.Y. February 18, 1976) at 21; *Evans* v. *S.S. Kresge Co.*, 394 F. Supp. 817, 827 (W.D. Pa. 1975).

A proper reading of *Lorain Journal* reveals that the Court there was elucidating a substantive violation of the Sherman Act prohibiting restraints on interstate commerce; it was not defining the contours of federal jurisdiction. Defendant in that case, a local newspaper, had been enjoined from refusing to deal with merchants who advertised with a radio station competing with defendant in the local market for dissemination of news and advertising. The Court determined that attempted monopolization of local advertising of nationally sold products—a charge never made in the instant case—was a violation of Section 2 of the Sherman Act:

> "The court found that the publisher, before 1948, enjoyed a substantial monopoly in Lorain of the mass dissemination not only of local news and advertising, but of news of out-of-state events transmitted to Lorain for immediate dissemination, and of advertising of out-of-state products for sale in Lorain. WEOL offered competition by radio in all these fields so that the publisher's attempt to destroy WEOL was in fact an attempt to end the invasion by radio of the Lorain newspaper's monopoly of interstate as well as local commerce." 342 U.S. at 150-1.

However, the language quoted by the trial court (A1196-7, *supra*, p. 20) served as the essential analytical support for the ruling that defendant in *Lorain Journal* had attempted to monopolize *interstate commerce*. Thus, the Supreme Court held that the business of local advertising of nationally marketed goods constituted interstate commerce such that a restraint imposed thereon (*e.g.*, the attempt to monopolize) would be cognizable under the Sherman Act. The Court did not rule that in the absence of such a direct restraint, mere publication of advertisements for products shipped interstate creates a "substantial effect" on interstate commerce sufficient to confer jurisdiction on the federal courts.

Of course, the result in *Lorain Journal* logically implies jurisdictional consequences, i.e., if a defendant has monopolized local advertising, or fixed prices therefor, defendant's acts are necessarily "in commerce", and a federal court has jurisdiction by reason of the "qualitative" test discussed *supra*. But it is emphatically clear that *Lorain Journal* does not hold that the fact that goods are sold interstate by those who advertise in a local newspaper, in and of itself, creates a "substantial effect" on interstate commerce if the newspaper is injured by a purely local conspiracy.

The acts of appellants in the instant case, owners of New York City taxi fleets, with no interest in newspaper publishing or dissemination of advertising, who did not monopolize or attempt to monopolize a market for interstate or intrastate advertising, did not fix prices on or refuse to deal with advertisers, indeed on the record below clearly did nothing at all with respect to *Taxi Weekly's* out-of-state or local advertising, and hence did nothing "in commerce", cannot be brought within the jurisdiction of the federal court under the "affecting commerce" test by reason of the *Lorain Journal* decision.

Subsequent judicial constructions of *Lorain Journal* confirm that its application by the Court below was misconceived.

The parties in *Greenville Publishing Co., Inc.* v. *Daily Reflector, Inc.*, 496 F. 2d 391 (4th Cir. 1974), were compet-

ing publishers of free weekly tabloids composed entirely of advertising. Plaintiff alleged an attempt to monopolize the market for advertising in Greenville. The court cited *Lorain Journal* for application of the "in commerce" test to restraints on local advertising. 496 F. 2d at 395.

> "The uncontroverted facts on this record demonstrate that the *advertising market in Greenville may likewise be a part of interstate commerce* for the purpose of the Sherman Act." *Id.* (emphasis added).

Defendants' monopolization of that market would put its acts "in commerce" and jurisdiction was affirmed. *Id.*

In *Page* v. *Work, supra*, plaintiff contended that *Lorain Journal*, among other cases, mandated federal jurisdiction over any antitrust claim involving a newspaper because national news and advertisements are routinely received and reprinted. However, the Ninth Circuit unequivocally rejected any such construction of that decision:

> *"In all of the above cases a restraint of interstate commerce was found which was determinative of federal jurisdiction. In none of the above cases did the Court hold, as appellant contends, that the interstate character of the newspaper business as a whole was the determining factor for federal jurisdiction."* 290 F. 2d at 331 (emphasis added).

To reiterate, there is no evidence in this record of any restraints upon national or local advertising attributable to defendants. As in *Lieberthal, supra*, the effect on *Taxi Weekly's* advertising resulting from the cancellation of subscriptions to the newspaper was, therefore, entirely "remote and fortuitous." Hence the ruling of the trial court that the demise of *Taxi Weekly* "substantially affected" interstate commerce under *Lorain Journal* because automobile manufacturers had significant interstate sales, was clear error as a matter of law.

Beyond the misinterpretation of *Lorain Journal*, the trial court erred in founding jurisdiction upon the interstate sales of *Taxi Weekly's* advertisers since the record contains no proof of any impact *upon those sales* resulting

from the termination of *Taxi Weekly's* business. Where a restraint is imposed directly on the flow of interstate commerce, it is presumed that its effects are sufficient to establish jurisdiction. *Greenville Publishing Co., supra,* 496 F. 2d at 395, n.6; *Rasmussen, supra,* 472 F. 2d at 526-8. But where, as here, jurisdiction must be a function of an effect on commerce derived from wholly intrastate activity, it is plaintiff's burden to prove how much such commerce is affected, and that this quantum of effect is "substantial." *Uniform Oil, supra,* 400 F. 2d at 269. Needless to say, the record below contains no evidence as to any decline in interstate automobile sales as a result of appellants' acts.

The erroneous theory of interstate sales of products advertised adopted by the trial court was just one of the purported foundations for federal jurisdiction argued by appellee below. Appellee also sought to prove that *Taxi Weekly's* destruction substantially affected interstate commerce in that the newspaper's interstate purchases of supplies and newsprint, and acquisitions of out-of-state news and advertising, were terminated thereby (A1168-76, 1334-50).

The out-of-state purchases of supplies and news stories can in no event support jurisdiction in this case since no evidence was introduced as to the quantity of commerce represented by such purchases (*see, e.g.,* A1353-7). The authorities leave no doubt that proof in dollars and cents figures is prerequisite to a determination of "substantiality." In *Uniform Oil,* for instance, plaintiff alleged purchases of petroleum products from out-of-state refineries seeking to satisfy the "affecting commerce test":

> "There is no evidence as to the volume or dollar amount of the purchases which Uniform Oil made from these two refineries * * * Therefore, *assuming that there was involvement with interstate commerce in the appellant's operation, there was nothing upon which the jury might have based an assessment of the substantiality of that involvement* * * * The absence of such indispensable proof deprived the District Court of jurisdiction over the Sherman Act claims." 400 F. 2d at 269-70 (emphasis added).

Harlem River Coop., supra, is in accord. There, plaintiff failed to prove how much interstate business was impeded by a labor strike directed at plaintiff's grocery.

> "In sum, *even assuming that the plaintiff was receiving shipments in interstate commerce from various suppliers* before the strike and that those shipments were stopped as a result of the strike, there was virtually no evidence before the jury from which the jury could draw a conclusion that any adverse effect the defendant's conduct might have had on interstate commerce was 'substantial.' " 70 Civ. 4128 (S.D.N.Y. February 18, 1976) at 25 (emphasis added).

See also, Watkins v. *Kwik Photo, Inc.*, 405 F. Supp. 260, 266 (S.D. Miss. 1975).

Even if hard figures had been established as to *Taxi Weekly's* purchases of interstate supplies, they could not sustain "affecting commerce" jurisdiction in the instant case, as such incidental supplies were not the subject of appellants' acts. The court in *Page* v. *Work, supra,* spoke expressly to this question where plaintiff, publisher of a defunct newspaper devoted to printing legal notices, sued its successful competitor and asserted the same jurisdictional contentions advanced by appellee below:

> "Appellant contends that there was direct and substantial injury to the interstate newsprint market. *The argument that the newsprint market suffered because Consolidated ceased buying newsprint when it went out of business is not convincing * * * Appellees were in no position to nor did they restrict competition in the newsprint market.* Uncontested facts show that the Bureau did not purchase newsprint for its members, and there was no evidence that appellees did anything to interfere with newsprint purchases by Consolidated. *Newsprint is only one of many ingredients in a newspaper, which is a separate product from the ingredients of which it is composed. Newsprint is not the product involved in this case.*" 290 F.2d at 332 (emphasis added).

Conceding that advertising is a "product involved" when a newspaper is destroyed, and that advertising is the one element of *Taxi Weekly's* business for which hard figures are on the record, the stipulation of *Taxi Weekly* and *Taxi Age* advertising revenues is the sole foundation on which "affecting commerce" jurisdiction could possibly rest in the instant case. That document, however, demonstrates that the termination of *Taxi Weekly* advertising had at best a negligible impact on interstate commerce.

The stipulation reveals that in fiscal 1964, *Taxi Weekly* printed approximately $50,000 worth of advertising, all but $6,424.71* of which is comprised of advertisements consummated by wholly intrastate transactions (A1615-17). *Lorain Journal* made clear that local dissemination of *only* that advertising which involves a "flow of copy, payments and materials moving across state lines" constitutes interstate commerce. 342 U.S. at 148. It is self-evident that all of the stipulated *Taxi Weekly* advertising, save that comprising the $6,424.71 noted *supra*, was the product of wholly intrastate movements of "copy, payments and materials" to advertising agencies located in New York (*Id.*).

Therefore, the demise of *Taxi Weekly* represented a maximum total impact on interstate commerce of $6,424.71. Such a figure is, appellants submit, utterly inconsequential. The applicable law mandates that the trial court's finding of "affecting commerce" jurisdiction in these circumstances be reversed.

This Court's decision in *Lieberthal, supra,* is controlling. Plaintiff in *Lieberthal* alleged a conspiracy to prevent him from opening a bowling establishment. Finding bowling alleys to be intrastate activities, the court turned to the alleged effect on commerce to determine if the "quantitative" test had been met. The only effect on commerce of defendants' conspiracy was deemed to be measured by the bowling equipment that would have gone into the plaintiff's business, an amount *de minimis* for purposes of ju-

* Even this figure is not broken down between *Taxi Weekly* and *Taxi Age*.

risdiction. 332 F.2d at 270. Relying on *Page* v. *Work*, *supra*, this Court held this minute impact on interstate trade not to be " 'direct and substantial [but] merely inconsequential, remote or fortuitous.' " *Id.*

The relationship between appellants' alleged conspiracy and the interstate advertising of appellee is entirely similar. It was alleged below that a wholly intrastate conspiracy operated to destroy an intrastate business. The impact on interstate commerce, limited to the small sums of out-of-state advertising, was even more "inconsequential, remote and fortuitous" than the sales of bowling equipment at issue in *Lieberthal*. The holding of this Court in *Lieberthal* is also required here.

The same result was reached, predicated on the same rationale, when an issue identical to that now before this Court was litigated before the Fourth Circuit *en banc* in the recent decision in *Hospital Building Co., supra*. Plaintiff there, a local hospital, alleged that defendant hospitals conspired to prevent plaintiff from relocating and expanding. The Fourth Circuit affirmed dismissal of the complaint and disposed of the "affecting commerce" question as this Court had in *Lieberthal*. The court discussed the jurisdictional consequences of a remote effect on plaintiff's incidental interstate contacts.

> "HBC suggests several ways in which interstate commerce has been affected by the Raleigh Group's thwarting of the Mary Elizabeth expansion. Neither the hospital's interstate purchases of supplies and equipment, its billings to national insurance companies and the federal government, nor its purchases of management services from its parent corporation have increased as they would were the hospital to expand. And the $4 million cost of expansion was to be financed by non-North Carolina lenders, so that substantial interest payments would flow across state lines.
>
> * * * [W]e conclude that the various ramifications noted by HBC do not add up to a sufficiently substantial effect upon interstate commerce to satisfy Sherman Act requirements. *The effect here seems to us the indirect and fortuitous consequence of the restraint of*

> *the intrastate Raleigh area hospital market, rather than the result of activity purposely directed toward interstate commerce * * * Moreover, when the various economic consequences are sorted out and considered in the perspective of their respective markets, it is obvious that none of them could have more than negligible impact: no source of supply or insurance company or lending institution can be expected to go under if Mary Elizabeth doesn't expand, and no market price likely will be affected. In short, we are unconvinced that the alleged conspiracy, even if successful, can affect interstate commerce in the detrimental manner that concerned Congress when it passed the Sherman Act.*" 511 F. 2d at 683-4 (emphasis added).

The relevance of the above ruling to the instant case is obvious. Appellants' alleged restraint on an intrastate newspaper, had, at best, a fortuitous effect on its interstate advertising. Upon consideration of the economic consequences of appellants' acts, however, it is undebatable that no source of advertising, newsprint or news stories has been put out of business by loss of *Taxi Weekly's* patronage. It is equally clear that the market price for none of these commodities was affected in the slightest by the termination of Taxi Weekly, Inc. as a business entity. The Fourth Circuit's analysis in *Hospital Building Co.* is also determinative of the instant appeal. There was no "affecting commerce" jurisdiction below.

The same conclusion is compelled by *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F. 2d 341 (9th Cir. 1969), where the owner of a local garbage disposal business sought to predicate federal jurisdiction on purchases of containers from out-of-state which ceased when his business collapsed. The court invoked *Lieberthal* in holding the termination of such purchases to be "incidental" and insufficient to transform local activity into interstate activity. 420 F. 2d at 341.*

* To the same effect, *see, Page* v. *Work, supra; Wolf* v. *Jane Phillips Episc.-Mem. Med. Ctr.*, 513 F.2d 684 (10th Cir. 1975); *Yellow Cab Co.* v. *Cab Employees Local 881*, 457 F.2d 1032 (9th Cir. 1972);

(footnote continued on next page)

The jurisdictional implications of the $6,424.71 of relevant interstate advertising published by *Taxi Weekly* are placed in proper perspective by the Ninth Circuit's discussion in *Rasmussen, supra*:

> "We recognize, however, that there must be some limit on the intrusiveness of Sherman Act regulation. *Since every enterprise, however localized, inevitably has some effect, however remote, on the flow of commerce among the states, some 'localness,' 'remoteness' or 'de minimis' factor must intervene or federal regulation is boundless.* This is the underlying theme of Page v. Work * * * and Sun Valley Disposal Co. v. Silver State Disposal Co., * * * Page and Sun Valley Disposal involved local businesses using supplies drawn from the stream of interstate commerce. *We recognized that interference with those businesses inevitably had some interstate effect. We held, nonetheless, that this effect was 'incidental' and did not justify federal regulation of competitive restraints imposed on businesses that were 'wholly local in character.'* " 472 F. 2d at 526 (emphasis added).

Thus stated, the "effect" on interstate commerce represented by the termination of Taxi Weekly, Inc. was demonstrably *de minimis*. Indeed, in *Watkins, supra*, the court agreed with defendants that plaintiff's $7,000 worth of proven interstate transactions was *de minimis*, and hence insufficient to sustain federal jurisdiction. 405 F. Supp. at 266. A trial court's determination that $8,500 of interstate business was *de minimis* for the same purpose was affirmed by the Ninth Circuit in *Yellow Cab, supra*.

The inescapable conclusion here is that the trial court lacked subject matter jurisdiction over the instant litigation. The judgment must, therefore, be vacated, and the complaint dismissed.

Lawson v. *Woodmere, Inc.*, 217 F.2d 148 (4th Cir. 1954); *Sapp* v. *Jacobs*, 1976-1 Trade Cas. ¶60,768 (S.D. Ill. 1976); *Klein* v. *Berkeley Bldg. Assocs.*, 1973 Trade Cas. ¶74,595 (S.D.N.Y. 1973); *Peter J. Allen Corp.* v. *California Furniture Shops, Ltd.*, 1972 Trade Cas. ¶74,236 (N.D. Cal. 1972); *Marston* v. *Ann Arbor Property Mgrs. Ass'n.*, 1969 Trade Cas. ¶72,862 (E.D. Mich. 1969), *aff'd*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970).

II

APPELLANTS' ACTS DID NOT CONSTITUTE A VIOLATION OF THE SHERMAN ACT.

As appellee's counsel advised the jury in his opening remarks (A49-50), Taxi Weekly, Inc. set out to prove at trial that because of a dispute between Peterman and the fleet owners on several policy issues, the latter conspired to and did injure it by cancelling subscriptions in concert and coercing advertisers to terminate relationships with *Taxi Weekly*. The testimony showed that a policy dispute did exist between *Taxi Weekly* under Peterman's guidance and the fleet owners, and that some of the cancellations resulted from such differences of opinion (A180-1, 436-9, 468-70, 498-9). Appellee failed completely, however, to adduce any direct evidence that the cancellations occurred pursuant to a conspiracy or that any person was "coerced" to cancel, and its own witnesses repudiated the allegations of "coercion" of advertisers (*see*, p. 17, *supra*).

At the close of the trial, the trial court denied "the usual motions" by appellants (A1010). It had taken the same action after appellee had rested (A923). In doing so, and permitting this case to go to the jury, the trial court committed clear error as a matter of law. Under the great weight of the authorities construing the ambit of the Sherman Act, it was apparent that appellee here had failed to prove any violation of that statute. On the record below, appellants were entitled to a directed verdict dismissing this action and the jury's verdict and the resultant judgment must be reversed and vacated.

Under its own theory of the case as alleged in the complaint and at trial (A10, 49-50), appellee proved that a group of taxi fleet owners, disenchanted with the editorial views of their long-time house organ newspaper, cancelled their subscriptions to that paper and switched their patronage to another newspaper whose editorial positions were more compatible with their own. The proof was so strong that the trial court remarked:

> "It is conclusive that he [Peterman] was *persona non grata, otherwise* [*they*] *wouldn't have done what you charged*" (A960) (emphasis added).

Even assuming what was not proved, but could only be inferred, that the cancellations were undertaken pursuant to a conspiracy; and assuming further what was not proved and could not be inferred from any evidence adduced, that unwilling fleet owners were persuaded to cancel by the conspiracy, the acts of appellants did not constitute conduct cognizable under the Sherman Act.

It is indisputable from the evidence in this case that injury to the competitive relationships in any discrete economic market for the production or exchange of goods and services was neither the intent of defendants in cancelling *Taxi Weekly* subscriptions, nor the result thereof. Appellee, by its own proof,* established that a sharp "political"** dispute ruptured relations between *Taxi Weekly* and the clients essential to its survival (A181). The taxi fleet owners had no interest in the newspaper business, and the destruction of *Taxi Weekly* could in no way benefit them as operators of taxi fleets. The record shows that taxi fleet owners did not feel obliged to subscribe to a publication espousing views they could not support, and they, therefore, cancelled subscriptions to *Taxi Weekly* (A436-9, 468-70, 498-9).

Conversely, the consequences of the alleged conspiracy were of absolutely no economic significance beyond the termination of Taxi Weekly, Inc. as a going concern. There was transparently no diminution in competition among the fleets in the provision of taxicab services in New York City, which, in any event, is a regulated industry.† Just as obvious is that competition in the market for dissemination of

* Appellee subsequently abandoned this theory when it became apparent that evidence of a dispute would damage its case. In his summation, appellee's counsel stated that no such dispute existed (A 1066), despite its having been pleaded in the complaint (A10), repeated in the opening statement (A49-50) and evidence to the contrary having been introduced. However, as the trial court recognized (A 960-1), it defies logic to believe that appellants implemented the alleged conspiracy if no differences existed between them and Peterman.

** Indeed, Peterman characterized his differences with the fleet owners as the same as those separating "Republicans" and "Democrats" (A181).

† Fares for taxicab transportation are determined by the New York City Taxi & Limousine Commission.

news and advertising to the taxi industry was unaffected by the alleged conspiracy. *Taxi Weekly*, as a client newspaper, was not a competitive economic entity. Rather, its position was similar to that of a manufacturer's exclusive distributor. The shift of its clients' patronage to another house organ had the same impact on competition as the substitution of one exclusive distributor for another, *i.e.*, none at all. One, and only one, newspaper represented the fleet position prior to the alleged conspiracy, and the same was true thereafter.

Thus, viewed in this light, the failure of appellee to persuade the trial court to adopt a *per se* approach to appellants' alleged boycott (A1238-40) and the resultant presentation of a "rule of reason" charge to the jury (A 1241) becomes irrelevant to a proper determination of this appeal. The issue here is not whether appellants' conduct is a *per se* violation or a "reasonable" restraint of trade, but whether that conduct is, as a matter of law, a "restraint of trade" at all within the meaning of the antitrust laws. The judicial development of the scope of the Sherman Act clearly indicates that it is not. Therefore, submission of this case to the jury under the Sherman Act was error, irrespective of the charge.

The definitive explication of the congressional policy embodied in the Sherman Act remains the Supreme Court's decision in *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940). At issue there was whether a labor strike imposed to force an employer to meet union demands and which prevented the interstate shipment of plaintiff's goods constituted a boycott prohibited by the Sherman Act. The Court's conclusions as to the reach of the Act and its application to the facts before it precludes any possibility that *Taxi Weekly* proved a *prima facie* case sufficient for a jury's consideration:

> "It [Sherman Act] was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. *The end*

sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

* * *

[*S*]*ome form of restraint of commercial competition has been the sine qua non to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price.* It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices." 310 U.S. at 492-500 (emphasis added).

The Court determined that the union activities at issue were not such a restraint of trade. Its reasoning as to intent and effect is controlling in the case at bar:

"Here it is plain that the combination or conspiracy did not have as its purpose restraint upon competition in the market for petitioner's product. Its object was to compel petitioner to accede to the union demands and an effect of it, in consequence of the strikers' tortious acts, was the prevention of the removal of petitioner's product for interstate shipment. So far as appears the delay of these shipments was not intended to have and had no effect on prices of hosiery in the market, and so was in that respect no more a restraint forbidden by the Sherman Act than the restriction upon competition and the course of trade held lawful in Appalachian Coals v. *United States, supra, because notwithstanding its effect upon the marketing of the coal it nevertheless was not intended to and did not affect market price."* 310 U.S. at 501-2 (emphasis added).

Taxi Weekly, Inc. proved that the reasons for appellants' acts were not of an economic nature. The fleet owners

were not attempting to achieve control of any commercial market, and it is not disputed that taxicab fares were not, and could not have been affected by the alleged conspiracy. Appellee made no attempt to prove, and could not have proven, that the market prices for ink, newsprint, or advertising space were in the least disturbed by *Taxi Weekly's* failure. Commercial competition was demonstrably unaffected by the acts alleged below. On this record, *Apex Hosiery* leaves no room for doubt that the alleged conspiracy to cancel *Taxi Weekly* subscriptions was not a "restraint of trade" within the meaning of the Sherman Act.

Subsequent lower court resolutions of similar questions confirm this conclusion. In this Court's decision in *Interborough News Co.* v. *Curtis Publishing Co.*, 225 F.2d 289 (2d Cir. 1955), for instance, plaintiff's contention that defendants' replacement of the former as their exclusive New York wholesaler with distributors of their own creation constituted a group boycott in violation of the Sherman Act was rejected. Significantly, it was alleged that Curtis had influenced other publishers who were reluctant to make the switch, to terminate their relationship with plaintiff. It is also pertinent to the instant situation that although Interborough had no direct proof of agreement among the alleged co-conspirators, it contended that their parallel action in removing their patronage to the new wholesalers required a finding of combination or conspiracy. This Court's affirmance of the trial court's dismissal of the complaint at the close of plaintiff's case makes clear that appellee did not adduce evidence worthy of submission to a jury:

> *"The nub of the matter is that the peculiar features of schemes for price fixing and elimination of competition * * * are wholly absent here. Curtis had a legal right to break away from a wholesaler whose service it considered unsatisfactory and to set up and encourage by subsidy new competing wholesalers; and there is no reason apparent to us why Curtis should not use every reasonable effort to influence and persuade other national distributors to patronize the new competing wholesalers.*

> *This was no plan or scheme to stifle competition or to fix prices or to regulate production, but rather an effort by Curtis to get better service and to induce as many of the other national distributors as they could to make a similar change* * * * *The competition as between the defendants was wholly unaffected.*" 225 F.2d at 293 (emphasis added).

The right of MTBOT members to withdraw their support from *Taxi Weekly* and to persuade other subscribers to do likewise is equally apparent.* There was no scheme to stifle competition at any level or in any market, and nothing of the sort occurred. As in *Interborough News*, therefore, "These observations * * * suffice to dispose of the claim that there was an illegal boycott" prohibited by the Sherman Act. *Id. Cf., Bowen* v. *New York News, Inc.*, 522 F.2d 1242, 1254 (2d Cir. 1975); *Coniglio* v. *Highwood Services, Inc.*, 495 F.2d 1286, 1291-3 (2d Cir. 1975); *Salerno* v. *American League*, 429 F.2d 1003, 1005 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971).

The recent decision in *A.T.I., Inc.* v. *Ruder & Finn, Inc.*, 1976-1 Trade Cas. ¶60,778 (S.D.N.Y. 1976) confirms that the result below is contrary to the law in this Circuit. An antitrust complaint alleging a conspiracy to destroy plaintiff's business was dismissed where neither intent to injure, nor effect upon competitive conditions in a marketplace were alleged. Indeed, such intent or effect were deemed implausible in circumstances similar to the instant case:

> "The allegations that defendants, all of whom are in the public relations business, intended to destroy the aerosol industry in general and plaintiff in particular are not sufficient to show intended *competitive* injury." 1976-1 Trade Cas. ¶60,778 at 68,373 (emphasis by the court).

Other recent authorities have similarly rejected antitrust claims where injury to competition was neither the intention nor the consequence of defendants' acts. Plaintiff in *Marjorie Webster Jr. Col.* v. *Middle States Ass'n. of*

* It is not disputed that all of appellants' subscriptions were terminable at will (A121, 582).

C. & S.S., 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970) alleged that defendants' refusal to accredit plaintiff because of its proprietary character was an actionable group refusal to deal. The court reversed the injunction granted by the trial court and held that no antitrust claim had been stated since there were no competitive implications of any economic relevance in defendants' action:

> "That appellant's objectives, both in its formation and in the development and application of the restriction here at issue, are not commercial is not in dispute." 432 F.2d at 654.

Since the Sherman Act was held to be aimed at combinations having "commercial objectives", it was ruled inapplicable to plaintiff's claim. *Id.*

The Ninth Circuit affirmed directed verdicts for defendant, again on facts extremely close to those of the case at bar, in *Cartrade, Inc.* v. *Ford Dealers Advertising Ass'n.*, 446 F.2d 289 (9th Cir. 1971), *cert. denied*, 405 U.S. 997 (1972). Plaintiff had been the exclusive inventory information agency for all Ford dealers in Southern California. The association of dealers then transferred its patronage to a new agency and terminated its relationship with plaintiff, which went out of business as a result. It was alleged that Ford and the association of its dealers conspired to establish the new information agency, to induce plaintiff's employees to work for it, and to restrict the dissemination of inventory lists to the new concern, to the exclusion of plaintiff.

The action was tried before a jury, but directed verdicts were granted at the close of plaintiff's case. In affirming, the court applied the analysis promulgated in *Apex Hosiery*, holding that: "there was no effect upon commerce in Ford cars"; there was no injury to competition in the dissemination of inventory information since one exclusive agency replaced another; and "there is here no evidence whatever that these decisions were made for anticompetitive reasons. * * *" 466 F.2d at 293-4. The court further noted that "to find liability here would be to saddle the dealers with Cartrade's services forever." 446 F.2d at

294. In short, Cartrade, like *Taxi Weekly*, was a "client" business which had lost its clientele.

Similarly, the judgment below implies that MTBOT's members would have to have been "saddled" with *Taxi Weekly* forever in order to escape antitrust liability. *Cartrade* teaches, however, that the collective decision to unburden themselves of appellee in favor of another newspaper was not an actionable restraint of trade. Moreover, the affirmance of directed verdicts in *Cartrade* is a clear lesson as to the error of the Court below in permitting submission of this case to the jury.

To the same effect are the legions of cases holding that manufacturers may agree to replace an exclusive distributor or wholesaler without violating the antitrust laws.* As stated in *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 76 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970), the theory common to these decisions is that the claim of the aggrieved distributor was not cognizable under the Sherman Act absent "a purpose either to exclude a person or a group from the market, or to accomplish some other anticompetitive objective, or both." It was necessary to prove an adverse "purpose or effect" on competition to establish an unlawful "restraint of trade." *Id.* at 78. The degree of competition obviously could not be disturbed by replacement of one exclusive wholesaler with another. Hence, even the presence of multiparty agreement amounting to a conspiracy would not bring defendants' conduct within the ambit of the Sherman Act. *Id.* at 78-80. In *Ace Beer Distrib., Inc.* v. *Kohn*, 318 F.2d 283 (6th Cir.), *cert. denied*, 375 U.S. 922 (1963), the court determined:

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* *See, e.g., Bowen* v. *New York News, Inc.*, 522 F.2d 1242, 1254 (2d Cir. 1975); *Colorado Pump & Supply Co.* v. *Febco, Inc.*, 472 F. 2d 637 (10th Cir.), *cert. denied*, 411 U.S. 987 (1973); *Ark Dental Supply Co.* v. *Cavitron Corp.*, 461 F.2d 1093 (3d Cir. 1972); *Bushie* v. *Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972); *Alpha Distrib. Co.* v. *Jack Daniel Distillery*, 454 F.2d 442 (9th Cir. 1972), *cert. denied*, 95 S. Ct. 74 (1974); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Ace Beer Distrib., Inc.* v. *Kohn*, 318 F.2d 283 (6th Cir.), *cert. denied*, 375 U.S. 922 (1963).

> "Unless it can be said that the refusal to deal with plaintiff *had the result of suppressing competition and thus constituted 'restraint of trade'* within the meaning of Section 1 of the Sherman Act, there is no violation of the Act. We do not think that the substitution by Stroh Brewery Company of one distributor for another had this result." 318 F.2d at 287 (emphasis added).

Lest it be argued that destruction of Taxi Weekly, Inc.'s business in and of itself constitutes an actionable "restraint of trade," appellants emphasize that courts have repeatedly held that the antitrust laws protect *competition*, not any single business entity. *Travelers Ins. Co.* v. *Blue Cross of West Pa.*, 481 F. 2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973); *Standard Motor Products, Inc.* v. *Federal Trade Commission*, 265 F.2d 674 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959); *Levin* v. *National Basketball Ass'n.*, 385 F. Supp. 149 (S.D.N.Y. 1974); *Checker Motors Corp.* v. *Chrysler Corp.*, 283 F. Supp. 876 (S.D.N.Y.), *aff'd*, 405 F.2d 319 (2d Cir. 1968), *cert. denied*, 394 U.S. 999 (1969). Plaintiffs in *Interborough News* and *Cartrade* were also driven out of business, and certainly the refusal of accreditation could have sounded the death knell of the college plaintiff in *Marjorie Webster*. Nevertheless, the destruction of these enterprises did not divert the courts' attention from the proper focus of inquiry, *i.e.*, the purpose and effect of defendants' conduct in relation to competition in commercial markets.

The same result has been achieved in numerous decisions applying the "rule of reason" to alleged concerted refusals to deal. These cases often involve "restraints of trade" to the extent that a "competitor" is excluded from a commercial market, but the conduct complained of is justified by legitimate economic reasons. Although appellants submit, and the above-cited cases establish, that even a "reasonableness" test of illegality is not appropriate to the case at bar, the rule of reason decisions are instructive in that they demonstrate that even under this doctrine, Taxi Weekly, Inc. failed to establish a *prima facie* case. The trial court therefore committed error in denying appel-

lants' motion for a directed verdict even when judged by the standard it had erroneously adopted to govern this litigation.

E. A. McQuade Tours, Inc. v. *Consolidated Air Tour Manual Committee*, 467 F.2d 178 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973) is illustrative. Plaintiff was excluded from the listings in defendants' tour directory when it failed to obtain written authorizations from hotels it sought to represent. Reversing a jury verdict, the "boycott" was held "reasonable" because there was no proof of intent to exclude McQuade from the wholesale tour market. 467 F.2d at 187. Nor was such proof a likely possibility, since defendant's member airlines were not in competition with McQuade in wholesale tour operations, and there was no proof of an attempt to monopolize that market. *Id.*

The same considerations should have governed any rule of reason analysis of the instant case. MTBOT and its members were not in the newspaper business. Moreover, appellee made no attempt to substantiate any allegations of monopolization. In addition, the trial court found the evidence "conclusive" that appellants cancelled *Taxi Weekly* subscriptions because of their "political" differences with Peterman and *Taxi Weekly* (A960).

Hence there is no question but that the exclusionary intent requisite to proof of an "unreasonable" restraint of trade simply was not present here, and was not and could not have been proven below. Appellee thus failed to fulfill its burden of proof under any proper application of a reasonableness test.*

The foregoing analysis would not be complete without reference to the *per se* rule urged upon the trial court by

* *See, Worthen Bank & Trust Co.* v. *National BankAmericard, Inc.*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974); *American Family Life Assurance Co.* v. *Blue Cross of Fla., Inc.*, 486 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 905 (1974); *Bridge Corp. of America* v. *American Contract Bridge League, Inc.*, 428 F.2d 1365 (9th Cir. 1970), *cert. denied*, 401 U.S. 940 (1971); *Deesen* v. *Professional Golfers Ass'n.*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966); *Florists' Nationwide Tel. Del. Network* v. *Florists' Tel. Del. Ass'n.*, 371 F.2d 263 (7th Cir.), *cert. denied*, 387 U.S. 909 (1967); *Dalmo Sales Co.* v. *Tysens Corner Regional Shopping Ctr.*, 308 F. Supp. 988 (D.D.C.), *aff'd*, 429 F.2d 206 (D.C. Cir. 1970).

appellee (A1238). It was appellee's view that it was the victim of a group boycott, a *per se* violation of the Sherman Act, and therefore it was not required to establish injury to competition in order to state a viable claim. Putting aside the fact that *Taxi Weekly* did not *prove* a concerted refusal to deal, its position totally ignores the settled foundation for the *per se* principle.

Those arrangements which are conclusively presumed illegal are so held by virtue of their obvious and necessarily "pernicious effect *on competition.*" *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958) (emphasis added); *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963). The *per se* rule has been consistently applied to horizontal or vertical combinations whose boycott activities had a "necessary" impact *on competition* in an economic market. *See, United States* v. *General Motors Corp.*, 384 U.S. 127 (1966); *Radiant Burners* v. *People's Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir.), *cert. denied*, 409 U.S. 1125 (1973).

The analysis returns, then, to its starting point. In the instant case it was "obvious" that the acts of appellants could have no possible effect on the competitive relationships in any commercial market. It was therefore "obvious" that the *per se* rule had no application herein.

In sum, the governing law requires a finding that Taxi Weekly, Inc. failed to prove a claim cognizable under the Sherman Act. The directed verdicts requested by appellants should have been granted. The judgment below must therefore be vacated, and the complaint dismissed.

III

DAMAGES WERE IMPROPERLY DETERMINED.

A. The Verdict Below

The jury determined that the appellee had been damaged by appellants' conduct in the amount of $225,000. Its verdict was founded on the testimony of one expert witness, James B. Kobak, who calculated the "going-concern" value of Taxi Weekly, Inc. in 1964 as $248,230.

When the verdict was announced the trial court expressed shock at the size of the damage award, and virtually invited a motion for judgment n.o.v. in regard to damages (A1162-3). Nevertheless, appellants' motion for such relief was ultimately denied (A1232).

The damage computation adopted by the jury was, in at least three distinct respects, inadequate as a matter of law. Kobak's testimony simply did not provide a basis from which a reasonable inference as to an appropriate measure of damages could be drawn, and the resultant verdict was therefore "monstrous" and contrary to the weight of the evidence. The applicable authorities require that the judgment be vacated and the case remanded for a new trial on damages.

B. The Kobak Valuation

Stated simply, Kobak computed the pre-conspiracy going-concern value of Taxi Weekly, Inc. in three steps:

(1) Taxi Weekly, Inc.'s net earnings for fiscal 1962, 1963 and 1964 were recalculated by Kobak to reflect increases of $35,000 of the $50,000 in salaries taken by Peterman and Weisinger (A546-7, 1490);

(2) Deductions from the net earnings for each year were made for federal and state income taxes, leaving a net profit for each year which was averaged (A548, 1490); and

(3) The average was multiplied by a purported "price/earnings ratio" of ten (A549, 1491).

The result was an estimated going-concern value of $248,230 as of June 1964 (*Id.*).

However, this mode of calculation falls far short of the minimum proof necessary to a computation of going-concern value which will withstand appellate scrutiny. It is now settled that the measure of damages for a business terminated by reason of antitrust violations must be the result of evidence of the following:

> "(1) What profit has the business made over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner?;
>
> (2) What is the reasonable prospect that this additional profit will continue into the future, considering all the circumstances existing and known as of the date of the valuation?"

Standard Oil Co. of California v. *Moore*, 251 F.2d 188, 219 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958); *Kestenbaum* v. *Falstaff Brewing Corp.*, 514 F. 2d 690 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3493 (March 2, 1976); *Albrecht* v. *Herald Co.*, 452 F. 2d 124 (8th Cir. 1971); *Vandervelde* v. *Put & Call Brokers & Dealers Ass'n.*, 344 F. Supp. 118 (S.D.N.Y. 1972).

The Kobak calculations clearly did not constitute the proof requisite under the above rule. Kobak not only failed to deduct Peterman's actual salary and a return on capital invested, but he also admittedly failed to take into account several significant market "conditions" which had a serious effect on the value of appellee's business. These omissions, coupled with the use of an earnings multiple of ten for which there was no foundation, were in complete conflict with the applicable law. Hence, in the context of an antitrust suit, Kobak's figures did not represent a legally cognizable going-concern value for Taxi Weekly, Inc.

(1) There was no deduction for Peterman's salary.

Appellee's damage calculation was erroneously inflated first because there was no deduction for the actual salary drawn by *Taxi Weekly's* editor, Peterman. Kobak did subtract $15,000 from gross earnings as an estimated replacement cost of the services performed by Peterman and Weisinger.

But this figure conflicted with Taxi Weekly, Inc.'s sworn statements in federal and state income tax returns (A1507, 1515, 1523, 1594, 1595) in which their services were valued at $50,000. Although certainly more advantageous to appellee, it was error to substitute a hypothetical "replacement

cost" given this direct, sworn evidence of the actual salaries.*

This is made clear in two recent Third Circuit decisions, *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975) and *Pitchford* v. *PEPI, Inc.*, 1975-2 Trade Cas. ¶60,653 (3d Cir. 1975). Both cases involved successful suits by closely-held corporate dealers against their supplier-manufacturers, alleging that defendants' conduct drove plaintiffs out of business. Damage calculations were issues on appeal in each, and defendants challenged the improper exclusion of the principal officer's salary therefrom. The *Coleman* court held:

> "The salary of plaintiff's principal shareholder, Clarence Coleman, was excluded from this computation. One of plaintiff's experts, a certified public accountant, conceded that officers' salaries were properly deductible as a business expense. The failure to deduct Coleman's salary had the effect of increasing corporate net earnings. Ultimately, this also would affect the projected annual earnings and worth of the business. We believe that Coleman's salary should have been included in the computation." 525 F.2d at 1352, n. 22.

The subsequent result in *Pitchford* was similar.**

There can be no question but that the failure below to deduct at least Peterman's actual salary of $25,000 (not to mention Weisinger's) artificially inflated *Taxi Weekly's* earnings, resulting in an inaccurate extrapolation of profit. In fact, under Kobak's analysis, Taxi Weekly, Inc. had a

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* Peterman never explained the salary of $25,000 for himself and Weisinger, if together their services were worth only $15,000. Before dividing "profits", purportedly equally, Peterman and Weisinger never deducted the so-called $15,000 replacement cost suggested by Kobak. In fact, the only "profit" divided equally was the excess over their actual salaries.

** "In particular, a plaintiff cannot receive its loss more than once. The salary of Mr. Pitchford should have been treated as a cost of operation in the data employed to project potential earnings for the purpose of evaluating the lost going-concern value of Pitchford. *The failure to deduct Mr. Pitchford's salary as an expense of the dealership artificially inflated earnings and made the profit extrapolation inaccurate.*" 1975 Trade Cas. ¶60,653 at 67,857 (emphasis added).

spectacular post-tax rate of profit of 25% of its gross earnings. Given the price/earnings ratio of ten assumed by Kobak, the salary "error" in respect to Peterman alone resulted in an "artificial inflation" of the damage award equal to at least $100,000, before taxes and before trebling.

(2) There was no deduction for return on capital.

The cases have established that "an amount fairly attributable to the return on the capital investment" must also be deducted from corporate earnings in order to avoid further "artificial inflation" of damage calculations. However, the Kobak valuation ignored this element entirely. This fact alone rendered appellee's damage calculation deficient.

In *Vandervelde, supra*, the court took judicial notice that time deposits in commercial banks earned interest of 4% per annum as of September 30, 1963. It then multiplied plaintiff's invested capital by 4% and deducted the product from net earnings in the process of arriving at a going-concern value for plaintiff's business destroyed by defendants' group refusal to deal. 344 F. Supp. at 150.

The court in *Simpson* v. *Union Oil Co. of California*, 411 F.2d 897 (9th Cir.), *rev'd on other grounds*, 396 U.S. 13 (1969) rejected plaintiff dealer's attempt to predicate damages to his close corporation upon a capitalization of his personal earning capacity. Among "[t]he issues [that] should have been" proven were, "what was the value of the business, what money did appellant have invested in it, what was its net income *after* deducting a fair return on capital and fair compensation to appellant for his work * * *?" 411 F.2d at 909-10.

Proper inclusion of a return on capital would have had a substantial impact on appellee's calculations in the case at bar. Peterman had invested $65,000* in acquiring his

* $50,000 represents the purchase price Peterman paid for Weisinger's one-half interest after the conspiracy alleged herein. If appellee had been as damaged thereby as alleged, it is curious that Peterman was willing to pay so high a price for it. Only six years before, Peterman had been able to acquire an equal interest for $15,000 in a business whose growth and earnings were concededly stagnant. Two years earlier, Weisinger had offered Peterman $30,000 for the same interest.

ownership interest in Taxi Weekly, Inc. (A94-6, 128). Assuming the 4% return employed in *Vandervelde*, $2600 would have to be deducted from Taxi Weekly, Inc.'s net earnings.* Again, given Kobak's price/earnings multiple of ten, appellee's damage estimate would thereby "deflate" a further $26,000, before taxes and before trebling.

(3) The rate of capitalization of net earnings was derived arbitrarily, without regard to crucial market factors.

Kobak determined that a prospective purchaser of Taxi Weekly, Inc. would be prepared to pay ten times its annual after-tax earnings (A549-50). He arrived at this conclusion by noting that securities of large, publicly traded corporations which published mass circulation magazines sold at an average price/earnings ratio of sixteen. He then discounted for Taxi Weekly, Inc.'s small size, private nature and stagnant growth posture (*Id.*). Kobak conceded that there was no formula for the discount to a multiple of ten; it was merely an educated guess (A563).

The choice of a price/earnings ratio of ten for Taxi Weekly, Inc. was fallacious for two reasons: such a multiple was incongruous on its face for a corporation whose net earnings, *before deduction of officers' salaries* (which averaged $50,000) never exceeded approximately $56,000; and its calculation failed to comprehend essential facts which would have enormous bearing upon the value of Taxi Weekly, Inc. on the open market.

The very starting point for Kobak's analysis was misconceived. The price investors are willing to pay for stock of multimillion dollar corporations publishing nationally distributed magazines has absolutely no relevance to the market price for a house organ trade newspaper, owned and operated by a single individual, distributed to a few local subscribers, and grossing approximately $100,000 in annual revenue. Although the law is that "only a similar business

* Before the conspiracy, Peterman had a $15,000 investment in Taxi Weekly, Inc. He earned an average "profit" above his salary of approximately $1,100.00, one-half of $2,214.70 (*see* p. 11, *supra*); a return on his investment of approximately 7%.

would provide a basis for a jury's consideration of damages on the termination point," *Pitchford, supra,* 1975-2 Trade Cas. ¶60,653 at 67,857, appellee initiated his evaluation with a comparison to corporations which were the very antithesis of Taxi Weekly, Inc. That the proposed multiple represents a discount to reflect some of appellee's obvious differences therefrom is little comfort since the original figure discounted is meaningless in this context.*

Moreover, the earnings multiple, a figure purportedly representing the purchaser's evaluation of the stability of the earnings on his investment, was computed in ignorance of those very factors having the most significant consequences for the future of Taxi Weekly, Inc.'s potential earnings. Thus, although *Taxi Weekly* was a client publication, the fact that its clientele had been thoroughly alienated was not considered (A723-4, 743-5). Kobak conceded that had he been informed of Peterman's difficulties with the fleet owners, who accounted for two-thirds of the subscriptions, his valuation might have been different (*Id.*).

In addition, Kobak's analysis did not rest on accurate *Taxi Weekly* circulation figures. Confronted with postal affidavits filed by *Taxi Weekly,* it became apparent that actual circulation of the newspaper was approximately one-half that assumed by Kobak's computation (A734-5, 739-42). Pending further study, Kobak admitted that this too might have influenced his evaluation had he not been misinformed by appellee (A743-5).

Finally, the consequences of appellee's admitted postal fraud on the market price for Taxi Weekly, Inc. were not accounted for in appellee's going-concern valuation (A745). As *Taxi Weekly* and *Taxi Age* were not different enough for either publication to retain second-class mailing privileges, in view of the fact that *Taxi Weekly* did not have

* At one point the trial court appeared to recognize the risk of using any multiple based on the selling price of securities:

> "MR. NESSEN: Your Honor, you are not suggesting that that is the proper method?
>
> THE COURT: Of course not. And I don't think anybody in their right mind would have even thought it. It's dangerous to say anything" (A528).

Kobak's "method" was used nevertheless.

sufficient paid subscriptions, a prospective purchaser would be faced with the substantial risk that such privileges would be revoked or other penalties assessed upon discovery of the fraud by postal authorities. The resulting increase in distribution costs would threaten Taxi Weekly, Inc.'s already meager revenue base. Nevertheless, this risk factor found no place in appellee's estimate of the risks of investment inherent in the operation of appellee's business.

Damage calculations which derive from such overly sanguine perspectives cannot sustain a jury verdict. In *Coleman, supra,* plaintiff's expert also testified that going-concern value could be calculated as ten times after-tax earnings. However, sales projections relied upon to compute potential earnings failed to account for significant factors:

> "This projection, however, rather than representing only the sales which plaintiff would have made but for the allegedly unlawful manner in which Chrysler operated its factory dealerships, represented as well the sales which plaintiff would have made but for the mere existence of the factory dealerships. Plaintiff did not introduce any evidence tending to show the amount by which the sales projection should have been reduced to compensate for sales lost as a result of the factory dealerships' lawful competition. The experts' projection of the number of Dodge sales plaintiff would have made, had there been no factory dealers, is predicated on an expanded market in which the factory dealers played a vital role. * * * Moreover, the experts' projection ignored the deteriorating character of the neighborhood in which Coleman was located. *We believe that a computation based upon such a comparison is unacceptable and inaccurate.*" 525 F.2d at 1352 (emphasis added).

The First Circuit in *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1970) affirmed a trial court's exclusion of testimony as to plaintiff's going-concern value which suffered from the same defects infecting Kobak's proof.

> "No consideration was given the future state of the skewer market, or to future costs of labor, executive salaries, supplies or equipment. The district court based its exclusion of this testimony * * * on the unreliability of the arbitrary period selected for capitalizing future profits and on the method of deriving figures for expected sales and profits." 421 F.2d at 83.

The court in *Vandervelde, supra*, the leading authority in this Circuit on antitrust damages to a terminated business, rejected plaintiff's evaluation of his business on similar grounds. The parallels between the facts of *Vandervelde* and the instant case are striking, and the reasoning of the court there is fully applicable to the issues now before this Court.

Vandervelde involved a suit by a securities broker against an association of similar dealers which alleged that defendants' suspension of plaintiff's membership caused the destruction of plaintiff's business. As was Taxi Weekly, Inc., plaintiff in *Vandervelde* was a one-man corporation dependent for its success on the good will established with larger brokerage houses. As in the case at bar, Vandervelde based valuation of his business on a high earnings multiple (20) because the shares of another, very different brokerage house had been sold at such a multiple, and ignored the principal risk factors inherent in plaintiff's particular business. Hence, the court's disposition of the valuation issue deserves careful scrutiny here:

> "Plaintiffs argue that an appropriate multiplier would be twenty times earnings, based on the fact that the shares of Lawrence Kotkin Associates—put and call dealers—were sold to the public at approximately that ratio to Kotkin's earnings in 1969. *However, there was little evidence that Vandervelde's business was even remotely comparable to Kotkin's. Kotkin's capital was at least three times as great as Vandervelde's, the business had a six year history of gross commission revenue which in the years preceding the ones here in issue was from two to six times as great as Vandervelde's and had net earnings after taxes far above the yearly earnings of Vandervelde from the commission*

*business * * *. Moreover, Vandervelde's own history contained elements which would put a prospective buyer on his guard * * *. Vandervelde's clientele was limited and dependent upon his ability to develop and maintain working relationships with the brokerage houses which had dealings with him. The firm was not one of the major put and call houses and this factor was the element providing special significance to the loss of patronage of Bache, duPont and the other firms with which Vandervelde had been developing contacts and whose cessation of dealings forced the decision to end operations * * ** While the earnings history indicates that Vandervelde was successful in maintaining these contacts * * * the ability to continue to do so could not be firmly forecast, since it depended on competition from other sources and, to some degree on the personal relationship between Vandervelde and brokerage house personnel who represented buyers and sellers of options * * *.*

*For all of these reasons, an appropriate capitalization rate for this business, in the circumstances in which it found itself at the date of the suspension would be in a range of approximately three to four times earnings in terms of estimating the value of the business to Vandervelde * * *.*" (344 F. Supp. at 151-2 (emphasis added).

The pertinence of *Vandervelde's* teaching is obvious. Peterman's alienation of the clientele he depended on would be the critical consideration for a prospective purchaser appraising Taxi Weekly, Inc. The Kobak formula, completely oblivious to the kind of analysis undertaken in *Vandervelde,* did not, therefore, offer the jury a rational mode of measuring appellee's going-concern value, and "the jury in the instant case could [not] have determined plaintiff's damages by just and reasonable inference from the evidence presented." *Coleman, supra,* 525 F.2d at 1353.

In *Simpson, supra,* a jury's award of $160,000 damages to plaintiff's business netting $5,000 per annum was held "monstrous" and reversed where the foundation for the calculation was contrary to law. 411 F.2d at 910.

The verdict below of $225,000 for a business which netted approximately $6,000 (A1522), based upon a wholly inadequate estimation of going-concern value is, appellants submit, equally "monstrous" and contrary to the weight of the evidence. It must, therefore, be vacated and remanded for a new trial.

IV

SHOULD THIS COURT DETERMINE THAT THE DAMAGES AWARDED WERE EXCESSIVE, THEN THE AWARD OF ATTORNEYS' FEES MUST BE REDUCED ACCORDINGLY.

The trial court awarded appellee $200,000 in attorneys' fees after trial (A1413). Should appellants prevail on this appeal, the award of attorneys' fees in that amount cannot stand. If this Court determines both that subject matter jurisdiction was present and that appellants violated the antitrust laws, but that, as appellants have asserted above, the damage calculations relied upon by the jury were grossly inflated, then the award of attorneys' fees must be vacated and remanded to the trial court to be reduced accordingly. *Albrecht* v. *Herald Co.*, 452 F.2d 124, 131 (8th Cir. 1971); *A. C. Becken Co.* v. *Gemex Corp.*, 314 F.2d 839, 843-4 (7th Cir.), *cert. denied*, 375 U.S. 816 (1963).

Conclusion

For all of the foregoing, appellants respectfully submit that the judgment must be reversed and vacated and the complaint dismissed, or in the alternative, that the judgment should be vacated and the action remanded to the District Court for a new trial on damages and a recomputation of attorneys' fees.

Respectfully submitted,

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Service of 3 copies of the
within Brief is hereby
admitted this 12th day of
April 1976
Signed Casey, Lane & Mittendorf Charles M. Pra
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